

FILED
APR 13 1928

W. E. STANS
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Supreme Court of the United States

October Term, 1928

No. 404

THOMAS D. MCCARTHY, UNITED STATES MARSHAL FOR
THE SOUTHERN DISTRICT OF NEW YORK,

Appellant,

vs.

JULES W. ARNDSTEIN,

Respondent.

MEMORANDUM ON BEHALF OF APPELLANT AND ON
BEHALF OF THE AMERICAN SURETY CO., et al.

JAMES M. BECK,

Solicitor-General, for Appellant.

LINDLEY M. GARRISON,

*of counsel to the American Surety Co.
and other Surety Companies.*

PAUL S. MYERS,

Special Assistant to Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1922.

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THOMAS D. MCCARTHY, UNITED
STATES MARSHAL FOR THE
SOUTHERN DISTRICT OF NEW
YORK,

Appellant,

vs.

JULES W. ARNDSTEIN,
Respondent.

During the course of the argument, for the first time, the jurisdiction of this Court in this case upon this appeal was brought into question.

The arguing counsel for the appellant not having been advised that this question would be raised and not having any doubts as to jurisdiction, had not the authorities upon the subject at his hand and did not therefore render the assistance to this court on that question which it is desirable that counsel should render.

Since the question is absolutely vital, counsel have felt impelled, in the very limited time at their disposal, to seek for such authorities as cast

light upon the situation and as will aid the court in reaching a proper determination.

It will be recalled that this same subject matter was brought before this court by the respondent Arndstein in a proceeding against the present appellant at the juncture of this case where Judge Manton sitting in the United States District Court for the Southern District of New York refused to issue a writ of habeas corpus applied for by said Arndstein. Judge Manton was simply enforcing the order of Judge Augustus N. Hand, requiring Arndstein to answer.

Mr. Justice McReynolds, writing the opinion for this court, stated that the writ was refused in the court below upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege and could not therefore refuse to reply when questioned in respect thereto.

He held, as a matter of law, that this was erroneous and that the schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and that the mere filing of them did not constitute a waiver of right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him.

The decision of this court was that the judgment below must be reversed and the cause remanded for further proceedings in conformity with that opinion.

Subsequently, upon the application of the Trustee in Bankruptcy, asking to be allowed to intervene and to have a re-argument and to have the entire record certified to this court, Mr. Justice McReynolds again spoke for this court and, after stating that the court below (meaning Judge Manton as just referred to) heard the case as upon

demurrer and held the petition for habeas corpus insufficient, referred to the previous judgment of the Supreme Court and stated, "The mandate only requires the Trial Court to accept our decision upon the point of law, to issue the writ and then to proceed as usual. If the petition does not correctly set forth the facts, or if proper reasons exist for holding the prisoner not shown by the petition, neither our opinion nor mandate prevents them from being set up in the return and duly considered."

Subsequent to these proceedings, the writ of *habeas corpus* was issued and a full return there-to made by the appellant herein.

In disposing of the issues raised Judge A. N. Hand among other things, said:

"Now it might have been reasonably contended before the decision of the Supreme Court that the answers to these questions laid the foundation for a very general cross examination about the property of the witness, where it then was, or what had become of it."

But he did not give effect to what he has just stated might reasonably be contended, because of the deduction which he made as to the meaning of the decision of the Supreme Court on the Arndstein appeal of which we have just spoken.

The expressions contained in Mr. Justice McReynolds' two memorandums of opinions above referred to seemed and seem to us to be so entirely clear that we are unable to understand how Judge Hand had any difficulty in understanding and properly applying them.

But it is obvious from what he said that he did misconstrue and misunderstand the opinions of this court and as we respectfully submit, misconstrued and misapplied them.

In this respect what he said was as follows:

"The deduction I have made as to the meaning of the decision of the Supreme Court on the Arndstein appeal is opposed to the weighty arguments made in the interesting and able brief submitted by counsel for the United States Marshal but I can reconcile no other conclusion than the one I have reached with what has been decided by the Appellate Court, and the remedy, if any, must lie in an appeal to that Court which can distinguish the present record by the one already before it, if my failure to do this is erroneous."*

It appears to us that the circumstances of this case call for the application of the doctrine enunciated by this court in the case of *Perkins v. Fourniquet*, 55 U. S. 328, at 330.

After having shown that the appeal brought up proceedings under a mandate issued by the Supreme Court after a previous hearing, Chief Justice Taney at the page last indicated, said:

"This objection (that the appeal will not lie) to the form of proceeding, involves nothing more than a question of practice * * *. If the decree of this court has been misunderstood or misconstrued by the court below, to the injury of either party, we see no valid objection to an appeal to this court, in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt, to enforce the execution of its own mandate in the court below."

After elaborating his reasons for approving the appeal under the circumstances and stating that the appeal certainly would not stay proceedings, he concluded upon the subject as follows:

* Bold face ours.

"It would be the duty of the Circuit Court, notwithstanding the appeal, to proceed to execute the judgment of this court, unless, as in this case, he entertained doubts of its construction and meaning, and deemed it, therefore, just and equitable to suspend its execution, until the decision of this court could be had in the premises."

This last sentence exactly characterizes, we respectfully submit, the state of mind and the conduct of Judge Hand in the premises because not only does he so state in his opinion but also in the order, at page 794, after sustaining the writ of habeas corpus which would otherwise have the effect of restoring the prisoner to freedom, he further ordered that the prisoner be "paroled in the custody of his counsel * * * pending the hearing and determination of the appeal from this order to the Supreme Court of the United States."

The general principle just alluded to will be found exemplified and dealt with in the following cases:

Metcalf v. City of Watertown, 68 Fed. 859

In re Blake, 175 U. S. 114

James v. Central Trust Co., 108 Fed. 929.

However this may be and whether or not this court should sustain the appeal upon the ground just mentioned, there appears to be no doubt about the propriety of the appeal as a matter of right and independent entirely of the question just dealt with.

In the court below the sole subject matter of consideration was whether or not the respondent here, who was called for examination under Sect.

21-A of the Bankruptcy Act, was justified, under the constitutional provision invoked by him, in refusing to answer the questions propounded to him in such examination.

His contention was that the constitution did so protect him and whether it did or not was the sole subject of inquiry.

The court below, feeling constrained to so decide by reason of what it understood to have been the determination of this court in the same proceeding, so construed the constitution and the Bankruptcy Act as to justify the respondent in his refusals to answer.

In a case which we submit is so closely allied to this in principle as to be indistinguishable, this court has held that an appeal lies *by the custodian* of the committed person from whose custody the committed person has been removed by the decision of the court below.

In *Boske v. Comingore*, 177 U. S. 459 at 465, Mr. Justice Harlan dealt with the doubt expressed on behalf of the person who had been committed, as to whether the Supreme Court could take cognizance of this case upon appeal from the District Court. He adverted to the Act of March 3, 1891, establishing the Circuit Court of Appeals and pointed out that by that Act it was provided that "appeals or writs of error may be taken from the District Courts * * * to this court (the Supreme Court) in certain cases, among others, 'in any case that involves the construction or application of the constitution of the United States.' The present case belongs to that class."

We feel justified in saying that the instant case likewise belongs to that class. There as here, the respondent who was discharged upon habeas

corpus invoked the protection of the constitution against his being restrained of his liberty by the appellant there as here, acting under an order of commitment, and there as here, the judgment of the District Court proceeded upon the ground that the proceedings against him were inconsistent with the laws of the United States (in this case, the Constitution of the United States).

In the Boske case, the contention of the appellant had been throughout that the constitution forbade the given force of law to those regulations adopted by merely executive officers. We think the case is proper here on appeal as one involving the construction and application of the Constitution of the United States. The instant case has exactly those same characteristics and we therefore feel that the same principle should be applied thereto and the appeal sustained.

Further weight is given to this conclusion by what Mr. Justice Brandeis stated in his opinion in the case of *Collins v. Miller*, 252 U. S. 364, at page 365, stating:

"Each party asks to have reviewed the construction given below to provisions of our Treaty with Great Britain * * *. The questions presented are therefore of a character which may be reviewed upon direct appeal under Sect. 238 of the Judicial Code. *Charlton v. Kelly*, 229 U. S. 447. But this court has jurisdiction on writ of error and appeal under that section, as under others, only from final judgments. * * *"

The court of its own motion raised the question whether the judgment in that case was final and determined that it was not and therefore the appeals were dismissed for want of jurisdiction. Be-

fore announcing this conclusion, the court entered its opinion as follows at page 371:

"In what has been said we must not be understood as recognizing the British Consul General as the party entitled to appeal from a decision in Collins' favor. (Collins being the person committed.) For the writ of habeas corpus was directed to the United States Marshal who held Collins in custody, and the Marshal was the party in whom rested the right to appeal, if Collins prevailed on final judgment."

Since the court below released Arndstein from the custody of McCarthy, the Marshal, it is a final judgment notwithstanding that for the purpose indicated and previously herein quoted, he paroled him in the custody of his counsel to await the determination of this court. This point was practically decided in the case of *Harkrader v. Wadley*, 172 U. S. 148, at page 162, Mr. Justice Shiras saying:

"We see no merit in the suggestion that the order discharging the prisoner was not a final judgment. It certainly, if valid, took away the custody of the prisoner from the State Court, and put an end to his imprisonment under the process of that court."

In this case, the order of the court below took away the custody of the prisoner from the marshal, released him from confinement and paroled him in the custody of his counsel **pending the determination of an appeal to this court**; hence, if this court should refrain from correcting the error which we allege was made, the prisoner will undoubtedly be, under this final judgment, released from custody.

Counsel regret that what they consider the gravity of this case in its effect upon the general administration of the Bankruptcy Law in the New York district may seem to cause them to be unduly urgent in obtaining a final and adequate decision from this court in the premises. If the determination reached by Judge Augustus N. Hand is not corrected (we of course feeling that it is erroneous and should be corrected) then henceforth the ability to discover assets of and properly administer the estates of bankrupts, certainly in the New York district—and we see no reason why this should not spread throughout the country,—will be seriously impaired and will be practically non-existent.

We therefore most earnestly request this court to retain the jurisdiction which we feel that the appeal vests in it and make final pronouncement on the record.

We have furnished copies of this to opposing counsel, and he has expressly consented to the submission of this memorandum.

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McCarthy.

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